

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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JUN 12 2012  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0133-PR
	)	DEPARTMENT B
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
TROY WILLIAM GIBBONS,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007114656001DT

Honorable Roland J. Steinle, III, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney  
By Diane Meloche

Phoenix  
Attorneys for Respondent

The Hopkins Law Office, P.C.  
By Cedric Martin Hopkins

Tucson  
Attorneys for Petitioner

V Á S Q U E Z, Presiding Judge.

¶1 Petitioner Troy Gibbons seeks review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim.

P. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Gibbons was convicted after a jury trial of armed robbery and sentenced to a presumptive 15.75-year prison term. His conviction and sentence were affirmed on appeal. *State v. Gibbons*, No. 1 CA-CR 08-0018 (memorandum decision filed Apr. 16, 2009). Gibbons filed a notice and petition for post-conviction relief, arguing in his petition the prosecutor had committed misconduct, the trial court had improperly given “extrinsic evidence to the jury” by providing it a dictionary definition, the trial court had violated his due process and speedy trial rights by continuing the trial and permitting the state to use evidence that was not timely disclosed, the court had “improperly influenced” his decision to reject the state’s plea offer, and his trial counsel had been ineffective by failing to object to purportedly improper statements by the prosecutor during opening statements and closing arguments. The trial court summarily dismissed Gibbons’s petition, concluding “no colorable claim ha[d] been presented.”

¶3 On review, Gibbons repeats his assertion that his trial counsel was ineffective in failing to object to various statements made by the prosecutor during the state’s opening statement and closing argument.<sup>1</sup> To prevail on a claim of ineffective assistance of counsel, Gibbons was required to demonstrate that his counsel’s conduct fell below prevailing professional norms and that the conduct prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). And, if Gibbons did not make a sufficient showing on either part of the *Strickland* test, his claim fails. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

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<sup>1</sup>Gibbons does not argue the trial court erred in summarily rejecting his other claims.

¶4 Gibbons identifies two purportedly objectionable statements by the prosecutor. First, during the state’s opening statement, the prosecutor stated: “And while the defendant was able to get away on [the date of the offense], the State is going to ask you to hold the defendant responsible for his actions.” Second, during the state’s closing argument, the prosecutor stated: “[Gibbons] is lying this whole time, Ladies and Gentlemen.” Gibbons argues these statements were improper because the prosecutor expressed her personal belief that Gibbons was guilty and “appealed to the jury’s passions and fears” by suggesting Gibbons should not be allowed to “get away.” See *State v. Morris*, 215 Ariz. 324, ¶ 58, 160 P.3d 203, 216 (2007) (prosecutor “cannot make arguments that appeal to the fears or passions of the jury”); *State v. Filipov*, 118 Ariz. 319, 323, 576 P.2d 507, 511 (App. 1977) (“[I]n closing argument[,] an attorney should never express his personal belief in the defendant’s guilt or innocence.”). He asserts that counsel therefore should have objected to these statements and that he was prejudiced by counsel’s failure to do so.

¶5 But, even assuming there was a valid basis for Gibbons’s counsel to have objected to the prosecutor’s statements, counsel’s failure to do so does not necessarily fall below prevailing professional norms. It is not enough to demonstrate that a viable objection could have been raised. Instead, we presume “that counsel’s conduct falls within the wide range of reasonable professional assistance” that “might be considered sound trial strategy.” *Strickland*, 466 U.S. at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955); accord *State v. Schurz*, 176 Ariz. 46, 58, 859 P.2d 156, 168 (1993). To overcome this presumption, Gibbons must show counsel’s decisions were not tactical in nature, but were instead the result of “ineptitude, inexperience or lack of preparation.” *State v. Goswick*, 142 Ariz. 582, 586, 691 P.2d 673, 677 (1984). Thus, disagreements

about trial strategy will not support an ineffective assistance claim if “the challenged conduct has some reasoned basis,” *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985), even if the tactics counsel adopts are unsuccessful, *see State v. Farni*, 112 Ariz. 132, 133, 539 P.2d 889, 890 (1975).

¶6 Gibbons has cited no authority and provided no evidence suggesting counsel’s failure to object in these circumstances falls below prevailing professional norms. Nor has he otherwise attempted to show that counsel’s conduct had no reasoned basis. *See Gerlaugh*, 144 Ariz. at 455, 698 P.2d at 700. It is not difficult to discern a possible reasoned basis for counsel’s conduct; counsel might have made a tactical decision not to object to the prosecutor’s allegedly improper argument to avoid drawing the jury’s attention to the statements. Accordingly, the trial court did not err in summarily dismissing Gibbons’s petition for post-conviction relief.

¶7 Although review is granted, relief is denied.

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge